Supreme Court, U.S.
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NO. 981614

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

BOB E CROMER,
Petitioner

VS.

BAYLOR UNIVERSITY; JOHN D. McCLANAHAN,
Individually and in his Official Capacity as
Chairman of the Baylor Art Department,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

1. Does this Court's decision in Delaware State College v. Ricks, 449 U.S. 250 (1980) control the disposition of this case, which is factually distinguishable from the Ricks case?

   More specifically, when does the statute of limitations begin to run if (a) a decision to terminate employment was expressly based on the recommendation of termination by a committee that subsequently withdrew and reversed its recommendation following a review requested by the original decisionmaker but (b) a new decisionmaker overruled the subsequent recommendation to continue the employment of the affected employee and issued a new notice of termination at a later date? Under such circumstances, does the statute of limitations on a cause of action relating to termination of employment begin to run at the time that the first decision was made or does the statute of limitations begin anew on a cause of action relating to termination when the second decision was made, overruling the committee's recommendation that employment not be terminated?

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CITATIONS FOR REPORTS OF LOWER COURT DECISIONS IN THIS CASE

United States District Court, Western Division of Texas, Waco Division: not reported. (Appendix, pages 1-7)

United States Court of Appeals for the Fifth Circuit: not reported.[1] (Appendix, pages 8-10)

STATEMENT OF JURISDICTION

Course of Proceedings

The United States Court of Appeals for the Fifth Circuit entered its judgment on the 7th of December, 1998. (A copy of the Fifth Circuit judgment and opinion is included in the Appendix bound with this Petition, pp. 8-10.) Petitioner's Motion for Rehearing was denied by Order entered on January 5, 1999. (A copy of the Fifth Circuit Order denying rehearing is included in the Appendix, p. 11.)

Supreme Court Jurisdiction

Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. § 1254(1), this being a petition for review of a judgment entered by the United States Court of Appeals for the Fifth Circuit on appeal from an Order of Dismissal entered by the

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[1] Even though the opinion of the Fifth Circuit is not published and has limited impact as legal precedent, Petitioner contends that the disposition in this case is manifestly erroneous and unjust to him and that the error compels reconsideration to prevent injustice that will occur repeatedly if the rationale adopted by the courts below is used as precedent for any future cases involving similar facts.

United States District Court for the Western District of Texas, Waco Division.

This Petition is filed for two purposes: (1) to correct the manifestly unjust and erroneous outcome of this case and to secure uniformity of decisions between the Courts of Appeals and this Supreme Court as previously set forth in Delaware State College v. Ricks, 449 U.S. 250, 66 L.Ed.2d 431, 101 S.Ct. 498 (1980); and (2) to request this Court to clarify the statute of limitation issues generally discussed in Ricks so that employees who may have valid claims for relief from adverse employment actions under federal laws will be better equipped to balance their desire to pursue amicable resolution through internal processes with their need to protect the viability of their claims by enlisting the assistance of external enforcement agencies.

In Delaware State College v. Ricks, cited supra, this Court reviewed a case involving a claim of discrimination asserted by a college professor who had been denied tenure and who was notified of the tenure denial one year prior to the date he was actually discharged from employment. This Court was required to determine the "unlawful employment practice" that formed the basis of Ricks' complaint and thereby determine the time at which the limitations periods commenced to run on his claims. Three dates were advanced and argued: (1) the date that Ricks was notified that the Board of the College had decided to deny Ricks' tenure, (2) the date that Ricks' grievance, relating to the Board's decision, was denied, and (3) the date that Ricks' employment ended. The Court determined that under the circumstances of the case, the date that Ricks was notified that the Board had decided to deny him tenure was the date that limitations period commenced. However, the Court plainly admonished that :

> "Complaints that employment termination resulted from discrimination can present widely varying circumstances...The application of the general principles

discussed herein necessarily **must be made on a case-by-case basis.**" Id. at 504, n.9 (emphasis added)

The Ricks opinion alluded to facts that could have been, but were not pivotal in determining exactly when the limitations period commenced, e.g.: (1) the identification of "discriminatory acts that continued until, or occurred at the time of, the actual termination of [Ricks'] employment" (Id. at 504); and (2) facts reflecting whether "the College had established its official position---and made that position apparent to Ricks" by the time he was notified of the tenure denial (Id., at 506). After reviewing the facts that occurred and were alleged by Ricks, this Court determined that the limitations period commenced to run when Ricks was notified of the decision and not when his grievance was denied, stating:

> "By June 26, the tenure committee had twice recommended that Ricks not receive tenure; the Faculty Senate had voted to support the tenure committee's recommendation; and the Board of Trustees formally had voted to deny Ricks tenure. In light of this unbroken array of negative decisions, the College had established its official position--and made that position apparent to Ricks--no later than June 26, 1974." Id., at 506.

Despite the caveats in the Ricks opinion, the District Court and the Court of Appeals in this case totally disregarded undisputed facts (as set forth below) that distinguish this case from Ricks. Instead, both courts decided inflexibly that this case was controlled by Ricks and that limitations commenced to run when Plaintiff Cromer was first notified by Baylor's President that tenure was being denied based on the recommendation of Baylor's tenure committee.

This Court rarely concerns itself with factual determinations, but the facts in the record of this case are virtually undisputed.[2] The case was decided on summary judgment before discovery was even initiated, much less completed. Even so, the record clearly contains undisputed facts that collectively would create a material fact issue as to whether or not Baylor had established an "official position" at the time that Plaintiff was first notified of the recommendation of the tenure committee and that the recommendation was the grounds for tenure denial. If Ricks was intended to set forth an inflexible rule that the statute of limitations commences upon the first notice of a terminal contract that is later followed by actual termination, regardless of the facts that occur between the first notice and the termination, then this Court must clarify the holding of Ricks to minimize the recurrence of injustice that has occurred in this case. Alternatively, if Ricks sets forth a more flexible rule relating to the commencement of limitations, then this Court must correct the injustice in this case and thereby avoid similar injustices in future cases that will be affected by the erroneous ruling in this case.

Statement of Undisputed Material Facts

Cromer was employed as a tenure-track Assistant Professor in the Art Department at Baylor University in September of 1989. In the Fall of 1994, Cromer applied for tenure. On February 20, 1995, Baylor's President, Herbert H. Reynolds[3], notified Cromer that his application for tenure was being denied "based upon the recommendation of the University Tenure Committee." This was the first notice to Cromer that the committee had recommended that tenure be denied. Shortly thereafter, Cromer

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[2] However, the District Court's opinion did misstate and omit some of the facts that were undisputed. The Court of Appeals recited no facts in its cursory opinion.

[3] President Reynolds became the university Chancellor on May 31, 1995, and Robert Sloan replaced Reynolds as President.

met with President Reynolds to state his dissatisfaction with his Department Chair's handling of the pre-tenure review and the probability that the Chair made misrepresentation(s) to the University Tenure Committee. President Reynolds recommended that Cromer request the Tenure Committee to reevaluate its recommendation. By letter dated March 8, 1995, Cromer requested reevaluation by the Tenure Committee. Cromer reported his action to the President by letter dated March 9, 1995.

On March 31st, President Reynolds delivered Cromer the usual form contract of employment for non-tenured faculty for the Fall and Spring semester of the 1995-96 academic year; however, a special provision was inserted into Cromer's contract which read "In accordance with the recommendation of the Tenure Committee, this contract is a one-year terminal contract."[4] Cromer signed the contract on April 18, 1995, inserting an addendum which read "By signing this contract I do not waive, but expressly reserve my right to challenge the recommendation of the tenure committee as described in the special provisions of this contract."

After Cromer met to discuss the tenure denial recommendation with President Reynolds in early March of 1995, President Reynolds directed the University Tenure Committee to reevaluate Cromer's suitability for tenure. In May of 1995, the University Tenure Committee notified Cromer that the committee was going to reevaluate his tenure application and invited him to submit additional materials in support of his contention that he should be granted tenure. In June of 1995, the University Tenure Committee withdrew its original

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[4] Baylor's personnel policies required that a tenure-track faculty member, who had been employed for three years or more, would receive a full one-year terminal contract if tenure was denied or if employment was to be discontinued in the future.

recommendation to deny tenure to Cromer. In September of 1995, the University Tenure Committee met with Cromer, his tenured colleagues in the Art Department, the Chair of the Art Department, and the Dean of the College of Arts and Sciences. After the meeting, the University Tenure Committee submitted a new, unanimous recommendation that Cromer's application for tenure be granted.

In November of 1995, the new President of Baylor, Robert Sloan, notified Cromer that his application for tenure was being denied and also notified Cromer that, in order to comply with the university's policies of providing a full year's notice of termination of employment, a new, extended terminal contract would be in effect through the Fall semester of the 1996-97 academic year.

Cromer filed a Charge of Discrimination with EEOC and the Texas Human Rights Commission in July of 1996, based on the November, 1995, decision and notice of tenure denial. Cromer's Original Complaint in the trial court also alleged that the November, 1995 decision was the basis of his discrimination/retaliation complaints.

Standard of Review

A District Court's grant of a summary judgment is to be reviewed de novo. "Summary judgment is proper when no issue of material fact exists and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was proper, all fact questions are viewed in the light most favorable to the non-movant." Moore v. Eli Lilly Co., 990 F.2d 812, 815 (5th Cir. 1992), cert. denied, 114 S.Ct. 467, 126 L.Ed.2d 419 (1993).

Argument and Authorities

Cromer contends that the District Court and the Court of Appeals erred in holding that the statute of limitations for filing

an EEOC complaint began to run when Cromer was notified of the first tenure denial decision in February of 1995, relying on this Court's opinion in Delaware State College v. Ricks, 449 U.S. 250, 66 L.Ed.2d 431, 101 S.Ct. 498 (1980).

In February of 1995, President Reynold's decision to deny Cromer's tenure was expressly and solely based on the negative recommendation of the tenure committee. In March of 1995, President Reynolds directed the tenure committee to reevaluate Cromer's suitability for tenure. From that time forward, the tenure committee acted at the direction and with the approval of Baylor University. The tenure committee's recommendation was rescinded and a reevaluation process was instituted by Baylor; the final decision to deny tenure was not entered until November of 1995. Because President Reynolds' decision to deny tenure to Cromer was ***expressly*** based on the tenure committee's negative recommendation and because the tenure committee[5], at President Reynolds' direction, reconsidered, rescinded, and reversed its recommendation, President Reynolds' original decision was essentially ***rescinded***. Also, because the Special Provision of Cromer's 1995-96 employment contract, which made it a one-year terminal contract, was ***expressly*** premised on "the tenure committee's recommendation" that tenure be denied. Because the tenure committee reconsidered, rescinded, and reversed its recommendation, the Special Provision of Cromer's 1995-96 employment contract was essentially ***nullified***. After the committee's recommendation was withdrawn, the committee had to issue a new recommendation before the administration could take any further action relating to Cromer's tenure and/or

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[5] In oral argument before the Court, Appellee's counsel correctly stated that the tenure committee that originally recommended denial of Cromer's tenure was the same tenure committee that subsequently unanimously recommended the granting of tenure to Cromer.

continued employment.[6] In September of 1995, after the committee met with Cromer, the Chair of his department, the Dean of his school and his tenured colleagues, the committee submitted a unanimous recommendation that tenure be granted to Cromer. In November of 1995, Baylor's administration, including its new President Robert Sloan, rejected the tenure committee's favorable recommendation and notified Cromer that tenure was being denied. Baylor clearly understood the consequences of the tenure committee's reversal of its recommendation when, in November of 1995, it notified Cromer that his 1995-96 contract of employment was being extended for an additional semester through December of 1996 (instead of May, 1996), stating that the extension was made for the purpose of complying with its policy that required one-year's notice of a tenure denial, i.e. a one-year terminal employment contract following a tenure denial ***decision***. For all of these reasons, Cromer contends that Baylor's decision in November of 1995 was an adverse employment action separate and apart from the February, 1995 action, and that the November, 1995 action was taken by the administration in spite of the tenure committee's favorable recommendation and that the November, 1995 action formed the basis of an EEOC complaint independent of the February, 1995 action that Baylor claimed to be the basis of its statute of limitations defense.

In Ricks, the Court considered three dates as possibilities for defining the beginning of limitations: (1) June 26, 1974, when Ricks received notice that he was being issued a terminal contract

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[6] Baylor admitted that, in September of 1995, the University Provost instructed the Tenure Committee that it had to make a new tenure recommendation to the administration in order for the decision-making process to continue.

based on the Board of Regents' vote to deny him tenure,[7] (2) September 12, 1974, when Ricks was notified that his grievance challenging the Board's decision had been denied, and (3) June 30, 1975, which was the ending date of Ricks' terminal contract. As noted supra, in affirming the district court's decision that the statute began to run on June 26, 1974, this Court stated:

> "We cannot say that [the district court's] decision was erroneous. By June 26, the tenure committee had twice recommended that Ricks not receive tenure, the Faculty Senate had voted to support the tenure committee's recommendation; and the Board of Trustees formally had voted to deny Ricks tenure. In light of this unbroken array of negative decisions, the District Court was justified in concluding that the College had established its official position and made that position apparent to Ricks no later than June 26, 1974." Id. at 506

In concluding that the statute commenced to run on June 26, 1974, this Court relied on two legal premises applied to the Ricks facts:

(1) Mere continuity of employment does not toll the running of the statute of limitation when the challenged employment practice occurred before the date that employment terminated, i.e. Ricks' one-year terminal contract did not extend the 180-day period within which he had to complain about the decision to deny tenure (Ricks, 101 S. Ct. 494, at 504); and

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[7] The actual vote of the Board occurred in March of 1974, and the Board of Regents was aware that Ricks had filed and presented his grievance to a subcommittee of the Board (which had not yet ruled on the grievance) prior to the June, 1974 letter that notified him that he was being issued a terminal contract.

(2) Collateral review of the challenged employment practice does not toll the running of the statute of limitations, and a mere request to reconsider does not toll the running of the statute of limitation, i.e. the statute continued to run during the time that Ricks' grievance was pending (Id. at 505)

The legal premises are not similarly applicable to the facts in this case. Ricks was claiming that the ending date of his one-year terminal contract was the date on which the statute began to run or, alternatively, the statute began to run on the date that he was notified that his grievance (i.e. *collateral* review) was denied. Neither of these claims is made in this case. First, Cromer is claiming that November 16, 1995, i.e., the ***beginning*** date of his one-year terminal contract, is the date that the statute began to run in this case. Secondly, Cromer never sought ***collateral*** review of Baylor's decision to deny tenure. At President Reynolds' suggestion, Cromer requested a reevaluation of his tenure application from and by the same committee that had made the negative recommendation that was the basis of President Reynolds' notice of tenure denial in February of 1995. President Reynolds also directed the same tenure committee to reevaluate its recommendation. As a result of the reevaluation, the tenure committee recommended unanimously that Cromer be granted tenure. Thereafter, a new decision was made by Baylor's new President and the new decision was to reject the tenure committee's recommendation and to deny tenure to Cromer in spite of the unanimous recommendation of Baylor's tenured faculty. Furthermore, Baylor itself knew that the November, 1995, decision was a new and different decision as evidenced by the fact that Cromer's contract of employment was extended through the fall of 1996 in order to comply with Baylor's one-year notice requirement in its personnel policies requiring one additional year of employment following a tenure denial decision. Cromer did not file a grievance or seek any collateral review of the November decision.

In his Response to Defendant Baylor's Motion for Summary Judgment, Petitioner noted that the facts in this case are virtually identical to the facts in the case of Reid v. University of Michigan, 612 F.Supp 320 (D.C. Mich. 1985), which was decided shortly after this Court issued its opinion in Ricks. The Reid Court held that the statute of limitations for the filing of an EEOC charge of discrimination began to run from the time that the Plaintiff was notified of a "de novo" tenure decision rather than from the earlier decision even if the Plaintiff had earlier been denied tenure. Id. at 323. In Reid, the decision not to grant tenure was made on December 16, 1977 and Reid was notified on May 8, 1978. During the ensuing year, Reid sought reconsideration without avail, and during that year Reid "was notified on at least two occasions that her employment" with the university "would end with the 1978-79 academic year" (Id. at 322), i.e. August 31, 1979 (Id. at 323). Reid then filed a grievance which resulted in a reconsideration of her tenure, including a new review of her record and a new "recommendation on tenure." (Id. at 323) The reevaluation did not change the decision of the university--to deny tenure. On January 17, 1980, Reid "was notified that her position with defendant was terminated as of August 31, 1979. On February 14, 1980, she was further notified that the LSA Executive Committee had decided against granting her tenure." (Id. at 323) Reid filed her EEOC complaint on February 22, 1980, almost three years after Reid was first notified of the decision to deny her tenure. Reid, like Cromer, alleged that discrimination continued through the second tenure decision and affected the second decision. The court held that Reid's EEOC complaint was timely because it was within the limitation period

following the second denial.[8] The district court erroneously failed to make a similar finding in this case.

SUMMARY

The difference between the positions adopted by Cromer and Baylor in this case can best be explained by using the processes of a lawsuit[9] as an analogy. Cromer contends that the November, 1995 tenure denial decision was the outcome of a *new trial* that President Reynolds granted in May of 1995. Cromer argues that Baylor's tenure committee, like a *jury*, reviewed the *evidence* presented to it and found against Cromer when it recommended denial of his tenure. President Reynolds, like a *judge*, accepted the committee's finding and entered *judgment* denying Cromer tenure and notified Cromer of the denial in February, 1995. In March, Cromer requested that the decision be reevaluated, i.e. *requested a new trial*, or, alternatively, asked for the reasons tenure was denied, i.e. *findings of fact and conclusions of law*. President Reynolds directed the tenure committee to re-evaluate its decision, i.e. *granted a new trial*.[10] In May, 1995, the committee invited Cromer to submit *new evidence* and in June, the committee withdrew its prior recommendation, i.e. *finding*. In

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[8] The defendant in Reid, like Baylor, relied on the Ricks decision and argued that Ricks required Reid to file her complaint within 300 days of her notification of the first tenure decision. The court distinguished Ricks on the basis of the differences between the facts of the Reid case versus the facts in Ricks, noting that the Supreme Court, in Ricks, had stressed the importance of a case-by-case analysis, as quoted above.

[9] References to analogous components of the legal system are identified by italics.

[10] The tenure committee declined to give Cromer the reasons for denial because they were going to reevaluate his claim for tenure.

September, the committee heard additional *evidence* in interviews and meetings with Cromer, his Department Chair, his tenured colleagues, and the Dean of his college. After conducting this *new trial*, the tenure committee made a new recommendation, i.e. *finding*, and unanimously recommended that tenure be granted to Cromer. The new President, Robert Sloan, entered a *judgment non obstante verdicto* and denied Cromer tenure and extended his contract to conform with the university's policy to provide a full year's notice of termination of employment. Cromer's time for filing with EEOC, i.e. his time to *appeal*, began to run when the second judgment was entered because the process had started anew in June of 1995 when the committee withdrew its original recommendation and began its reevaluation. Furthermore, the one-year terminal contract issued in March of 1995 was expressly premised upon the tenure committee's recommendation, rather than on President Reynolds "decision", and the provision, as written, was no longer applicable once the tenure committee, with full authority of the President, withdrew its recommendation and later submitted a unanimous recommendation to grant tenure to Cromer.

Baylor, on the other hand, contends that the February, 1995 tenure denial was a *final judgment* and that Cromer was merely granted an *appellate review* that was denied when the administration decided to enforce the February judgment, i.e. *affirm* the judgment in November of 1995. Baylor convinced the trial court and the court of appeals that because the administration was the ultimate and only final decisionmaker in tenure matters, the final tenure decision was made in February of 1995 and was merely being reviewed between May and November of 1995. Thus, the issue in this case requires the court to choose between two alternatives: (1) there was one, and only one, final tenure decision made by Baylor, and it was made in February of 1995 and merely affirmed in November, 1995 or (2) there were two tenure decisions made by Baylor in this case, one in February of 1995, and another in November of 1995.

One cannot decide between these two alternatives if one focuses solely on the outcome because the outcome was the same in February and in November of 1995--tenure was denied. However, if one analyzes the process underlying the two identical outcomes, it is clear that there were two decision-making processes that resulted in the same outcome. The February decision was made on the basis of the tenure committee's recommendation and the November decision was made solely by the administration, in spite of the tenure committee's recommendation to the contrary.

The district court and the court of appeals erroneously focused solely on the outcome without considering the underlying undisputed facts relating to the process that occurred between the February, 1995 denial and the November, 1995 denial. Baylor argued to the court that Cromer should have known that this was merely a review of a final decision because the letter advising Cromer of the "reevaluation" stated clearly that "This reevaluation does not necessarily mean that the recommendation of the Tenure Committee or the decision of the University will change." This statement within the Tenure Committee's letter is not controlling. In fact this statement is equally true of the outcome of a *new trial* and the outcome of an *appeal.* The granting of a new trial does not necessarily mean that the outcome will change, but the granting of a new trial does mean that the judgment previously entered is not a final judgment. Also, the granting of a new trial means that a new trial will be held, including consideration of new evidence, if appropriate. After the new trial, a judgment will be entered and the original judgment will not be appealable, but the appeal will be based on the new judgment, and the time for appeal will not run while the new trial is being conducted and the new judgment is being entered.

Because Baylor inappropriately focused the attention of district court and the court of appeals on the outcome of Cromer's new trial rather than on the process that occurred during the re-evaluation, both courts erroneously ruled that the tenure decision was final in February as opposed to November of 1995, and that

the statute of limitations began to run in February as opposed to November of 1995. There are clearly material facts in support of Cromer's position that the university's decision was not final until November of 1995; thus, Cromer's EEOC complaint was not barred by limitations and this case should be reversed and remanded for trial preparation and trial.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant Petitioner's Petition for writ of Certiorari, review the decision of the Fifth Circuit Court of Appeals, rendered on December 7, 1998, reverse the judgment of the Fifth Circuit Court of Appeals and remand this case to District Court for trial on the merits.

Respectfully submitted,

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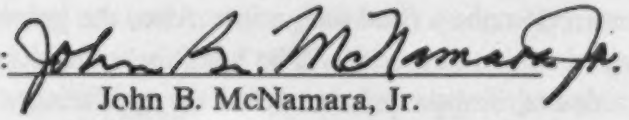
By: 
John B. McNamara, Jr.
Attorney for Petitioner

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

BOB E. CROMER,	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action**
	§	**No. W-96-CA-404**
	§	
BAYLOR UNIVERSITY, and	§	
MR. JOHN D. McCLANAHAN,	§	
Individually and in his	§	
Official Capacity as	§	
Chairman of the Baylor	§	
Art Department,	§	
Defendants.	§	

ORDER

Plaintiff brings this action under the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e), et seq., amended in 1991) ("Title VII") asserting that he was terminated because of his gender. Plaintiff further asserts that he was retaliated against because of his complaints regarding gender discrimination and that the acts of the Defendants constituted intentional infliction of emotional distress under Texas law. The Defendants moved to dismiss Plaintiff's claims based upon intentional infliction of emotional distress, which the Court granted. The Defendants now move for summary judgment as to Plaintiff's remaining claim. Having reviewed the Defendants' motion and Plaintiff's response, the Court is persuaded the motion for summary judgment is meritorious and should be granted.

I. Summary Judgment

Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case." Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir. 1982).

In determining whether the movant has met its burden, the Court must view the evidence introduced and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment. See id. at 1031. All reasonable doubts as to the existence of a genuine issue of material fact must be resolved against the movant. See id. at 1031; Jones v. Western Geophysical Co., 660 F.2d 280, 283 (5th Cir. 1982). When determining whether to grant summary judgment, the Court is merely determining whether a factual dispute exists and is not required to resolve those disputes. See Jones, 669 F.2d at 283. The fact that it appears to the Court that the non-movant party is unlikely to prevail at trial or that the movant's statement of facts appears more plausible is not a reason to grant summary judgment. See id. at 283.

Once the movant has shown the absence of material factual issues, the opposing party has a duty to respond with any factual assertion that would preclude summary judgment. See Cleckner v. Republic Van & Storage Co., 556 F.2d 776, 771 (5th Cir. 1977). Rule 56(e) of the Federal Rules of civil Procedure provides that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for

trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." In this respect, the burden on the non-moving party is not especially heavy; however, he must show specific facts that present a genuine issue of material fact worthy of trial rather than showing mere general allegations. See Gossett v. Du-Ra-Kel Corp., 569 F.2d 869, 872 (5th Cir. 1978).

II. Discussion

Plaintiff's suit arises out of the Defendants' decision not to offer Plaintiff a tenured professorship with the Department of Art at Baylor University. the undisputed facts establish that Plaintiff was informed by letter dated February 20, 1995, from then President of Baylor Herbert H. Reynolds, that his request for tenure was denied and that the 1995-96 academic year would be his terminal year as a member of the Baylor faculty. The ultimate decision was to whether to grant or deny tenure is made by the President and Provost of Baylor, in consultation with the appropriate dean. Plaintiff requested reevaluation of the tenure denial in a letter dated March 8, 1995. The terminal contract was issued to Plaintiff on March 31, 1995. In a letter dated May 4, 1995, the Chair of the Tenure Committee notified Plaintiff that the Committee would reevaluate its tenure recommendation, but Plaintiff was further informed that the reevaluation did not necessarily mean that the recommendation of the Tenure Committee or the decision of the University would change.

ON June 8, 1995, the Tenure Committee wrote to Dr. Donald Schmeltekopf, the Provost and Vice president for Academic Affairs of Baylor, informing him that the Committee was withdrawing its recommendation to deny tenure to Plaintiff but was declining to make either a positive or negative recommendation as to tenure. After Dr. Schmeltekopf informed the Committee that it must make a recommendation, either positive or negative, the Committee recommended that Plaintiff

be granted tenure in a letter dated September 27, 1995. The recommendation was forwarded to Robert B. Sloan, the new President of Baylor, who elected to enforce the prior decision to deny Plaintiff tenure. This decision was communicated to Plaintiff by letter dated November 16, 1995. Plaintiff filed his charge of discrimination with the Equal Employment Opportunity commission ("EEOC") on September 11, 1996. The Defendants argue that Plaintiff's EEOC complaint was not timely filed.

Title VII requires an aggrieved person to file a complaint "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e). In certain circumstances, this period may be extended to a maximum 300 days. Id. The Defendants contend that even under the 300-day limit, Plaintiff's complaint is untimely. the Defendants argue that the filing period should be calculated from February 20, 1995, the date he was denied tenure. Despite Plaintiff's arguments to the contrary, the Court agrees.

In Delaware State College v. Ricks, 449 U.S. 250 (1980), the Supreme Court held that the determination of timeliness of an EEOC complaint requires identification of the precise unlawful employment practice at issue. Here, Plaintiff complains that he was denied tenure. As noted, this denial was accomplished on February 20, 1995, and was not extended by Plaintiff's continued employment with Baylor. The Ricks court noted: "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." Id. at 257. The fact that the Tenure Committee elected to review the denial of tenure also does not extend the required filing period. "Mere requests to reconsider, however, cannot extend the limitations periods applicable to the civil rights laws." Ricks, at 261 n.15. Additionally, as previously noted, the Tenure Committee had no authority to grant or deny tenure -- that decision was with in the power of the President and the Provost, in consultation with the appropriate dean. Accordingly, Plaintiff's EEOC complaint, and his civil rights suit, are untimely.

In his response to the Defendants' motion for summary judgment, Plaintiff requests leave to file an amended complaint to add issues regarding waiver and estoppel as to the Defendants' limitations argument. Although the Court ordinarily should allow amendment of a complaint if dismissal may be avoided, amendment in this case would be futile. Even assuming Plaintiff has successfully raised the issues of waiver and estoppel, he presents no summary judgment proof to establish that any act of Baylor or its employees misled Plaintiff into foregoing any important right. therefore, Plaintiff's motion to amend will be denied.

the Defendants additionally move for summary judgment as to Plaintiff's claim of intentional infliction of emotional distress. The Court originally granted the Defendants' motions to dismiss on this issue under the mistaken impression that Plaintiff had failed to respond to the Defendants' motions. However, a review of Plaintiff's response to the Defendants' motion for summary judgment reflects that Plaintiff included his response to the motions to dismiss in his response to the motion for summary judgment. The Court will, therefore, address this issue.

In order to recover for intentional infliction of emotional distress, the Plaintiff must establish that "(1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's actions caused him emotional distress; and (4) the emotional distress was sever." McKethan v. Texas Farm Bureau, 996 F.2d 734, 742 (5th Cir. 1993). the approach followed in Texas was adopted form § 46(1) of the Restatement (Second) of Torts. See Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993). The trial court must, in the first instance, determine "whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993) (quotations omitted). "Actionable" conduct is that which "exceed[s] all possible bounds of decency" and which is "utterly intolerable in a civilized community." Id. at 735. Any

lesser standard "would wholly undermine the employment at will doctrine by subjecting employers to 'a potential jury trial in connection with virtually every discharge.'" McKethan v. Texas Farm Bureau, 996 F.2d at 742, citing Wornick Co. v. Casas, 856 S.W.2d at 736.

An employer's actions in the vast majority of employment disputes, such as disciplinary actions, criticisms, or discharge, is generally not outrageous even if unfair. See Ramirez v. Allright Parking El Paso, Inc., 970 F.2d 1372, 1376 (5th Cir. 1992). It is only the rare case where working conditions amount to "extreme and outrageous" conduct. As the Fifth Circuit has noted,

> We also acknowledge that it is not unusual for an employer, instead of directly discharging an employee, to create unpleasant and onerous work conditions designed to force an employee to quit, i.e., "constructively" to discharge the employee. In short, although this sort of conduct often rises to the level of illegality, except in the *most* unusual cases it is not the sort of conduct, as deplorable as it may sometimes be, that constitutes "extreme and outrageous" conduct.

Wilson v. Monarch Paper Co., 939 F.2d 1138, 1143 (5th Cir. 1991) (emphasis in original). The activities identified by Plaintiff in this case fail to rise to the level of "extreme and outrageous" conduct. While Plaintiff additionally seeks leave to amend his complaint to more fully plead the facts underlying his claim of intentional infliction of emotional distress, the Court, again, believes that amendment will be futile. Even assuming the truth of the facts included in Plaintiff's First Amended original Complaint, attached as an exhibit to his response to the motion for summary judgment, these facts fall short of those necessary to establish a claim for intentional infliction of emotional distress. Accordingly, it is

ORDERED that Defendants' Motion for Summary Judgment is **GRANTED**. It is further

ORDERED that any motions not previously ruled upon by the Court are **DENIED**.

SIGNED this 13th day of January, 1998.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-50159

D. C. Docket No. W-97-CV-249

BOB E CROMER

Plaintiff - Appellant

v.

BAYLOR UNIVERSITY; JOHN D MCCLANAHAN, Individually and in his Official Capacity as Chairman of the Baylor Art Department

Defendants - Appellees

Appeal from the United States District Court for the Western District of Texas, Waco.

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: JAN 10 1998

OP-OA-J-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-50159

BOB E CROMER

Plaintiff-Appellant

versus

BAYLOR UNIVERSITY; JOHN D MCCLANAHAN,
Individually and in his Official Capacity
as Chairman of the Baylor Art Department

Defendants-Appellees

Appeal from the United States District Court
For the Western District of Texas
(W-97-CV-249)

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges.

PER CURIAM:

This case is controlled by Delaware State College v. Ricks, 449 U.S. 250 (1980). We affirm.

Entered: December 7, 1998

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-50159

BOB E CROMER

Plaintiff-Appellant

v.

BAYLOR UNIVERSITY; JOHN D MCCLANAHAN,
Individually and in his Official Capacity
as Chairman of the Baylor Art Department

Defendants-Appellees

Appeal from the United States District Court
For the Western District of Texas

ON PETITION FOR REHEARING

Before HIGGINBOTHAM, BENAVIDES, and DENNIS, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT: January 5, 1999

/s/ P. Higginbotham
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
APR 26 1999
OFFICE OF THE CLERK

No. 98-1614

In The

Supreme Court of the United States

October Term, 1998

BOB E. CROMER,

Petitioner,

v.

BAYLOR UNIVERSITY, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BAYLOR UNIVERSITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The petition correctly lists the interested parties except as follows. Counsel for Respondent are:

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Baylor University, a Texas non-profit corporation, does not have any parent corporations. There are no nonwholly-owned subsidiaries of Baylor University.

Although Petitioner lists John D. McClanahan in the caption of the case as a Respondent, Petitioner does not list him as an interested party, and the question presented by Petitioner does not involve the claim made against McClanahan in the courts below. Thus, Baylor assumes that McClanahan is not a Respondent. To the extent that McClanahan is considered a Respondent, he is also represented by the same counsel as Baylor.

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BAYLOR UNIVERSITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Baylor University ("Baylor"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Bob E. Cromer, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on December 7, 1998.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Courts Below

Petitioner filed suit against Baylor on July 18, 1997, alleging that Baylor's decision to deny him tenure was motivated by gender discrimination. On November 20, 1997, Baylor filed a Motion for Summary Judgment asserting that Petitioner's discrimination claims were barred by the statute of limitations. After receiving an extension of time to respond to the Motion for Summary Judgment, Petitioner filed his response on December 3, 1997. On January 13, 1998, the District Court, in an unpublished order, granted Baylor's Motion for Summary Judgment due to Petitioner's failure to timely file his charge of discrimination with the Equal Employment Opportunity Commission ("EEOC").

On February 12, 1998, Petitioner filed his Notice of Appeal. The Fifth Circuit heard oral argument of the case on December 3, 1998. Four days later, in a two sentence, unpublished, per curiam opinion, the Fifth Circuit unanimously affirmed the judgment of the District Court on December 7, 1998.

Statement of Facts

In 1989 Baylor hired Petitioner as an Assistant Professor in the Department of Art at Baylor University. Petitioner continued to teach at Baylor for several years under a series of annual contracts. In 1994 Petitioner submitted an application for tenure. On January 11, 1995, the Tenure Committee recommended to the Administration that Petitioner not be granted tenure. Although the Tenure Committee makes a recommendation as to the grant or denial of tenure, the ultimate decision as to whether to grant or deny tenure is made by the President and Provost of Baylor, in consultation with the appropriate dean. By letter dated February 20, 1995, from then President of Baylor Herbert H. Reynolds, Baylor unequivocally notified Petitioner that his request for tenure was denied and that the 1995-96 academic year would be his terminal year as a member of the Baylor faculty. Specifically, the letter informed Petitioner: "I am advising you that you are being denied tenure at Baylor University and that the 1995-96 academic year will be your terminal year as a member of the University faculty."

Although there is no procedure to appeal or request reconsideration of tenure decisions at Baylor, by letter dated March 8, 1995, Petitioner requested reevaluation of the tenure denial. Baylor nevertheless issued a written terminal contract to Petitioner several weeks later on March 31, 1995. Like the earlier letter to Petitioner from Dr. Reynolds, which notified Petitioner that he had been denied tenure, the contract unequivocally reiterated that Petitioner had been denied tenure and that the contract was "a one year terminal contract." Petitioner signed the

contract – a contract which defined the legal relationship between the parties.

As the contract made clear, the tenure decision was final and had been implemented. By letter dated May 4, 1995, the Chair of the Tenure Committee informed Petitioner that the Committee would reevaluate its tenure recommendation, but also informed Petitioner that: "This reevaluation does not necessarily mean that the recommendation of the Tenure Committee or the decision of the University will change." Indeed, neither the written tenure denial issued by the President of the University nor the terminal contract were ever withdrawn. On June 8, 1995, the Tenure Committee wrote to Dr. Schmeltekopf, the Vice-President and Provost, and stated that it was withdrawing its previous negative tenure recommendation and was declining to make either a positive or negative recommendation as to tenure. After Dr. Schmeltekopf informed the Committee that it must make a positive or negative recommendation, the Committee, by letter dated September 27, 1995, recommended that Petitioner be granted tenure. The recommendation was forwarded to the new President of Baylor, Robert B. Sloan; however, Dr. Sloan reiterated the decision of Baylor to deny tenure to Petitioner, and the decision was communicated to Petitioner by letter dated November 16, 1995.

On September 11, 1996, over one and a half years after President Reynolds notified Petitioner of the tenure denial, Petitioner filed his charge of discrimination with the EEOC. The charge is dated as being signed by Petitioner on September 3, 1996.

Petitioner asserted that the Chair of his department, John McClanahan, treated Petitioner unfairly as compared to a female professor. Petitioner's Original Complaint and his Response to the Motion for Summary Judgment went to great length in complaining about every petty slight which Petitioner imagined while he was employed at Baylor. Petitioner believed that McClanahan's plans against him culminated in McClanahan placing a memo in the tenure review file which led to the Tenure Committee's recommendation to deny tenure in January 1995. Petitioner's chief complaint was the allegation that McClanahan allegedly sabotaged his tenure application by convincing the Tenure Committee to recommend a denial of tenure. Petitioner's sole complaints about discrimination in the tenure denial process were the allegations that McClanahan put a memo in his tenure file, misrepresented facts, and withheld information prior to the February 20, 1995 denial of tenure. Petitioner did not allege any facts that would support an argument that any of the three decision makers who reaffirmed the earlier tenure decision, i.e., President Robert Sloan, Vice-President and Provost Donald Schmeltekopf, and Dean William Cooper, discriminated against Petitioner on the basis of his gender. Petitioner's complaints about McClanahan's conduct toward him concerning the tenure decision were all complaints about conduct prior to the February 1995 tenure denial. Consequently, Petitioner never identified any unlawful practice within the limitations period.

REASONS FOR DENYING THE WRIT

Petitioner asserts two reasons why this Court should grant a Writ of Certiorari in this case. First, Petitioner claims that the decision of the Fifth Circuit was erroneous. Second, Petitioner requests that the Court clarify the statute of limitations issues discussed in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Baylor submits that the decision of the Fifth Circuit is correct. Further, there is no need for clarification of the statute of limitations issues decided in *Ricks*. No reason exists which would merit Supreme Court review of this case. Following a discussion of why this case does not merit review by this Court, Baylor will demonstrate that the Fifth Circuit's decision is correct. Lastly, Baylor will show that there is an additional defect in Petitioner's claims which would render review of the case pointless.

First Ground – This Case Does Not Merit Supreme Court Review

The Question Presented section of Petitioner's Petition demonstrates that this is a case which this Court should decline to review. Petitioner asks this Court to determine whether Petitioner's case is factually distinguishable from the *Ricks* case. As this Court's Rule 10 states: "A petition for writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law." All that Petitioner complains about is the alleged misapplication of a rule of law. Petitioner cannot even allege that the rule of law was misstated because the Court of Appeals did not state the

applicable rule of law; rather, it simply cited the applicable case citation.

This case does not meet the criteria for certiorari. There is no allegation of a conflict among the circuits. The case does not raise any important and recurring federal issue requiring clarification by the highest court in the land. There was no dissent in the Court of Appeals, and there was no request for en banc review. This is a fact-bound case in which the Fifth Circuit applied settled law to the facts of the case. Petitioner wishes to debate the application of settled law to the particular facts and circumstances of this case. If this case meets the criteria for certiorari, then so would every case.

Petitioner also claims that this Court should grant certiorari to clarify *Ricks*. No clarification is needed. *Ricks* makes it clear that the statute of limitations begins to run at the time of the alleged unlawful employment practice and that reconsideration of the alleged unlawful decision does not extend the limitations period. Thus, the Supreme Court has already established a bright line rule for aggrieved employees to follow.

Petitioner also complains that the Fifth Circuit's decision will result in repeated injustices if the opinion is used as precedent. As the Court of Appeals did not write an opinion, it is difficult to see how it could be used as precedent. There is actually no appellate opinion for this Court to review. The District Court did write a short opinion; however, the opinion is not published and it has not been picked up by the electronic services as an unpublished opinion. For the opinion to be used as precedent, a party would have to find a copy of the opinion in

the files of the District Clerk for the Western District of Texas.

Petitioner claims that the decisions of the District Court and the Court of Appeals resulted in a great injustice. There has been no injustice in this case. Congress intentionally enacted a short statute of limitations for employment discrimination cases, and the result of Congress' decision is that the deadline for filing claims will often be missed. With respect to Petitioner's claim of injustice, it should also be noted that Petitioner has obtained another job teaching at the University of Mississippi. Moreover, the underlying premise of his claim, that three male administrators discriminated against him because he is male, is preposterous.

This case is simply one of the thousands of non-meritorious employment lawsuits which are filed by disgruntled employees each year and which are needlessly clogging our court system. The District Court properly granted summary judgment in Baylor's favor. The Fifth Circuit reviewed the District Court's decision and unanimously affirmed the judgment. Petitioner now comes to this Court rehashing the arguments he made to the Court of Appeals. This case is of no importance other than to the parties, and the case does not merit the attention of this Court. In addition to being an unimportant case, the case was, as will be demonstrated below, correctly decided.

Second Ground – This Case Was Correctly Decided

As set forth in the charge of discrimination filed with the EEOC, the adverse employment action about which

Petitioner complained was the denial of tenure. Title VII requires aggrieved persons to file a complaint "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e). Under certain circumstances, the filing period is extended to a maximum of 300 days. *Id.* The 300 day provision may apply if the complainant has "initially instituted proceedings with a state or local agency." *Id.* Petitioner did not file his charge of discrimination until September 11, 1996, 569 days after the tenure denial decision on February 20, 1995.

The United States Supreme Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980), mandates the decision reached by the District Court and the Court of Appeals in this case. Ricks served as a college professor at Delaware State College. The College formally denied tenure to Ricks on March 13, 1974. The College then issued Ricks a terminal contract on June 26, 1974. Ricks filed a grievance, which operated as a request for reconsideration. The College denied the request for reconsideration on September 12, 1974. Ricks filed a charge with the EEOC on April 4, 1975. This Court stated, "Determining the timeliness of Ricks' EEOC complaint, and this ensuing lawsuit, requires us to identify precisely the 'unlawful employment practice' of which he complains." *Id.* at 257. The Court noted, "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Id.* The Court then determined that "the only alleged discrimination occurred – and the filing limitations periods therefore commenced – at the time the tenure decision was made and communicated to Ricks. That is so

even though one of the *effects* of the denial of tenure – the eventual loss of a teaching position – did not occur until later." *Id.* at 258 (emphasis in original). After concluding that the limitations periods commenced to run "when the tenure decision was made and the [employee] was notified," *id.* at 259, the Court proceeded to analyze which of several possible dates would commence the running of limitations. The District Court had adopted the date of the terminal contract as the date of the decision, and the Supreme Court found that this decision was not erroneous; however, the Court's discussion indicates that the earlier March 13 date of the notification could have commenced limitations to run. *Id.* at 262 n.17.

Applying the holding of *Ricks* to the present case, Petitioner was required to file his charge of discrimination no later than 300 days from the February 20, 1995 notification of the formal decision to deny tenure. As Petitioner missed this deadline by more than eight months, the District Court and Court of Appeals correctly held that limitations barred the Title VII claims.

Petitioner argues that limitations commenced to run on November 16, 1995, the date on which Dr. Sloan renotified Petitioner that tenure was still denied. Petitioner essentially argues that limitations was tolled while the reevaluation was pending. Such arguments were rejected by this Court in *Ricks*. In *Ricks*, the dissent and the EEOC as amicus curiae argued that limitations should not begin to run until Ricks was notified that his grievance had been denied. The Court rejected this contention and noted: "The existence of careful procedures to assure fairness in the tenure decision should not obscure the principle that limitations periods normally commence

when the employer's decision is made." *Id.* at 261. "Mere requests to reconsider, however, cannot extend the limitations periods applicable to the civil rights laws." *Id.* at 261 n.15.

Petitioner asserts that the result in this case should be different than the result in *Ricks* because the Tenure Committee changed its recommendation while Professor Ricks had no success with his appeals. Under the reasoning put forth by Petitioner, any perceived positive action for an employee in a review process would delay the start of the running of limitations. Such a test would introduce substantial uncertainty into the date on which limitations began to run. How much positive response would there have to be? Under Petitioner's theory, any time there was an extensive review of an employment decision, then it is the later confirmation of the earlier decision that starts limitations running rather than the actual decision at an earlier time. Of course, there will almost always be a fact issue as to whether the review was extensive enough to delay the start of limitations running.

Petitioner's theory also flies in the face of this Court's reasoning in *Ricks*. This Court indicated that courts should use the date of the employment decision for starting limitations as it would not be susceptible to confusion. Indeed, courts must use the date of the employment decision because Title VII mandates that courts use such date. Petitioner's proposed theory also serves to defeat the very purpose for having limitations periods. "The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly

assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Ricks*, 449 U.S. at 256-57.

In an effort to avoid limitations, Petitioner claims that the Tenure Committee's later recommendation for tenure required a new denial of the request for tenure which in turn started a new limitations period running. Such an argument defies logic because the ultimate decision remained in the hands of the Administration and the Administration never indicated to Petitioner that the decision to deny tenure had been altered. In fact, all indications were to the contrary. For example, Baylor issued a terminal contract to Petitioner *while the request for reevaluation was pending*.

It is also important to recall that the Tenure Committee does not make the decision to grant or deny tenure. The tenure decision is made by Provost Schmeltekopf and President Sloan, in consultation with the dean of the college of the tenure candidate. The decision of the Tenure Committee to change its recommendation in no way alters the facts that Petitioner was told on February 20, 1995 by the President of Baylor that tenure had been denied and that this decision never changed. As the February 20, 1995 tenure denial is the alleged discriminatory act about which Petitioner complains, and Petitioner failed to file the charge within the requisite time period, the District Court and the Court of Appeals correctly held that the Title VII claims were barred by the statute of limitations.

Petitioner devotes the Summary of his Petition to an argument that Baylor's tenure process can be analogized

to a lawsuit, but the analogies urged by Petitioner are wholly inaccurate. For example, the Tenure Committee at Baylor has no final decision making authority; it performs an advisory function in connection with decisions to grant or deny tenure. A civil jury, in contrast, is the final decision making authority on questions of fact. Moreover, there is no procedure to seek reconsideration of a tenure denial. Such a request certainly does not suspend or deprive a tenure denial of finality, as does a timely motion for new trial in a lawsuit. These are examples of the many reasons Petitioner's lawsuit analogy is misleading.

Petitioner cites *Reid v. University of Michigan*, 612 F.Supp. 320 (D.C. Mich. 1985), for the proposition that limitations does not begin to run until the tenure reconsideration process is completed. There is a crucial distinction between *Reid* and the present case. In *Reid*, the plaintiff alleged that the reevaluation process itself was discriminatory. *Id.* at 324 ("If plaintiff can prove that the *de novo* decision was discriminatory in these respects, that decision would be an unlawful employment practice occurring within the actionable period."). In the present case, Petitioner has offered no summary judgment evidence that the reaffirmation decision made by President Sloan, Vice-President Schmeltekopf, and Dean Cooper was infected by any discriminatory motivation. Rather, all of Petitioner's summary judgment evidence concerning the tenure decision goes toward proving discrimination by McClanahan leading up to the February 20, 1995 decision. In his Response to Defendants' Motion for Summary Judgment, Petitioner alleged only the following concerning discrimination in the tenure decision:

> Following the 1994 pre-tenure review, Defendant McClanahan prepared and circulated to the tenured faculty a document that misrepresented facts related to Plaintiff's 1994 pre-tenure review. The document was placed in Plaintiff's tenure file but was not disclosed to Plaintiff, and Plaintiff was deprived of an opportunity to respond to the document during the tenure application process. In addition to affirmatively misrepresenting facts to the University Tenure Committee, Defendant McClanahan also failed to disclose to the Committee relevant information that reflected favorably on Plaintiff's suitability for tenure.

Likewise, the allegations in Petitioner's Affidavit in support of his Response to the Motion for Summary Judgment dealing with alleged discrimination in the tenure process were limited to events which occurred prior to the February 20, 1995 decision. Although Petitioner's case is easily distinguishable from *Reid*, it should be further noted that the reasoning in *Reid* is not consistent with *Ricks*. *Ricks* makes it clear that requests for reconsideration will not toll limitations. If requests for reconsideration could toll limitations, a plaintiff could continually extend limitations by continuing to request reconsideration.

A well reasoned Seventh Circuit opinion also rejects many of the arguments put forward by Petitioner. In *Lever v. Northwestern University*, 979 F.2d 552 (7th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993), Northwestern University denied tenure to plaintiff Janet Lever. Although her department unanimously recommended promotion, the vote of the Tenure Committee was one vote shy of the

two-thirds vote needed to recommend tenure. On May 5, 1980, the Dean of the College of Arts and Sciences wrote to Lever that he would not recommend to the Provost that she be promoted and that he was offering her a terminal contract for the 1980-81 year. Despite reviews and re-reviews, the Dean adhered to his decision, and on February 12, 1981, the Provost wrote to Lever that he would not reverse the decision of the Dean not to recommend tenure. After receiving a delegation of disgruntled professors from Lever's department, the Dean agreed that he would review a manuscript on which Lever was working if it was completed by a certain date and that, after further evaluation, he would reverse or confirm his recommendation to the Provost. Lever submitted the manuscript on time, but the Dean did not alter his recommendation on tenure. Lever argued that the Dean's willingness to review further evidence rescinded the earlier decision and started the running of limitations anew. The District Court rejected this contention and held that limitations barred the claim. The Seventh Circuit affirmed and held that the May 5, 1980 letter was the triggering event.

In the present case, Petitioner also argues that the decision to review the recommendation and permitting the opportunity to submit new evidence delayed the running of limitations. This argument is the same one that was rejected by the Seventh Circuit. Lever also made another argument similar to one made by Petitioner herein that was rejected. Lever argued that she should not have to file a Charge of Discrimination while the review was pending. As the Court explained, "An employer's refusal to undo a discriminatory decision is

not a fresh act of discrimination. If it were, then an employee could avoid the 300-day limit by filing a series of appeals or fresh requests. . . . " *Id.* at 556. Lever claimed that it would create friction during the review and appeals process if she had to file a Charge during that time. In rejecting that argument based on the policy reasons for having statutes of limitations set forth in *Ricks,* the Court noted in passing that Lever could have had her cake and eaten it too because seventeen of the 300 days remained at the time the Provost said no on February 12, 1981. Likewise, in the present case, Petitioner could have also had his cake and eaten it too. When Dr. Sloan wrote to Petitioner on November 16, 1995, approximately one month remained before the 300 days ran from the February 20, 1995 denial of tenure. The same argument concerning the creation of friction was made by the dissent in *Ricks* and was rejected in the majority opinion. *Ricks,* 449 U.S. at 256.

Petitioner also attempts to raise two arguments in his Petition which were not raised in the District Court or the Court of Appeals. Petitioner argues that the tenure denial was "expressly based" on the Tenure Committee's recommendation and that the Tenure Committee's changed decision was a nullification of the special terminal provision in the employment contract. As these arguments were not presented to the lower courts, Petitioner should not be allowed to raise them for the first time in this Court. Further, the arguments are meritless. First, while Dr. Reynolds did mention the Tenure Committee's recommendation in his letter, there is no indication that this was the only factor considered by Dr. Reynolds. Dr. Reynolds may well have had additional bases for denying

tenure. Second, the Tenure Committee cannot nullify contractual provisions. Contracts are issued by the President, and the President makes the ultimate tenure decision.

In summary, *Ricks* required the District Court and the Court of Appeals to identify precisely the unlawful employment practice of which Petitioner complained. The District Court and the Court of Appeals correctly identified the alleged unlawful decision as the decision to deny tenure on February 20, 1995. This is the decision which Petitioner maintains was infected by McClanahan's discriminatory animus towards him. As more than 300 days elapsed before Petitioner filed his Charge of Discrimination, the Title VII claims were barred by the statute of limitations.

Third Ground – The Case Contains an Additional Defect

The case contains a defect which would render review by this Court meaningless as to the ultimate outcome of the case. Even if this Court accepted Petitioner's argument and decided that the EEOC charge was timely filed, the result would be the same. On page 11 of his Petition, Petitioner specifically states that the February 1995 and the November 1995 decisions were separate and distinct employment actions. Thus, the charge would be timely as to the second decision but not as to the first. Petitioner, however, did not allege any discrimination in the second decision. The only alleged discrimination occurred in the first decision. Should this Court adopt Petitioner's arguments, the result would be that the case would return to the District Court for it to review a

decision as to which there has been no allegation of discrimination. Such an exercise would be pointless and a waste of judicial resources. This defect in the case is yet another reason the Court should deny certiorari.

CONCLUSION

Petitioner has failed to provide any compelling reasons for this Court to grant a Writ of Certiorari. Petitioner contends the Fifth Circuit Court of Appeals reached an incorrect result; however, this appears to be an argument that the Fifth Circuit improperly applied the law established by the statute and this Court to the facts in this case. Such an evidentiary review is not favored by this Court. Further, this case has not been used by the District Court or the Court of Appeals to state a new and important position on an important or unsettled question of the law. Instead, this is a case only of significance to the parties. Additionally, the District Court and the Fifth Circuit Court of Appeals were correct in their decisions. This case does not merit further review by this Court.

For all of the foregoing reasons, Baylor requests that Petitioner's petition be denied.

Respectfully submitted,

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